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# Supreme Court of the United States

OCTOBER TERM, 1972.

**No. 71-651**

STATE OF CALIFORNIA,

*Petitioner,*

*vs.*

JUDITH H. KRIVDA AND RODGER T. MINOR,

*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

## BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Attorney General of the State of California, counsel for the Petitioner, and by Mr. Roger S. Hanson, Esq., counsel for the Respondents. Letters of consent of both parties have been filed with the Clerk of this Court.

## INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the state of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represent over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct. With regard to police professionalism law-related activities, the IACP, in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal activity affect-

ing police work, it coordinates the activities of Police Legal Advisors and Police Legal Units, nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The interest of both *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement.

With regard to the issue of the legality of the search of Respondent's trash, *amici* wish to associate themselves with, and express complete support for, the position taken by the Petitioner, the State of California, namely: that the search was proper and that the rule of *Katz* v. *United States*, 389 U. S. 347 (1967), should not be extended to create a newly-discovered "expectation of privacy" in one's abandoned trash. We will not, however reiterate the arguments made by the Petitioner on this issue.

With regard to the second issue of this case: assuming that the search of Respondent's trash was, in fact, a Fourth Amendment violation, whether the application of the Exclusionary Rule is constitutionally mandated. *Amici*, for obvious reasons, consider this issue to be one of overriding importance both to law enforcement officials nationwide and to citizens concerned with the fair and effective enforcement of the criminal law. Again, we will not reiterate the comprehensive arguments on this issue made by Petitioner and other *amici* in support of Petitioner; rather, we will present additional arguments for our contention that a narrowing of the scope of application of the Exclusionary Rule to those violations which are willful, flagrant, and substantial would be beneficial to law enforcement and to society as a whole.

## SUMMARY OF ARGUMENT.

*Amici* in this brief support the position taken by Petitioner, the State of California. We have collected herein cases and articles representative of the growing number of critics of the absolute application of the Exclusionary Rule. We submit that the Exclusionary Rule has failed the test of time. Its continued absolute application has weakened our criminal justice system by turning obviously guilty criminals free to commit crime again. This result has produced a deleterious impact upon the courts, upon law enforcement, and most importantly upon a society already overburdened with a rising crime rate.

It is our contention that America's law enforcement officers have demonstrated their professionalism by their dedication to lawful and proper conduct. We support this belief by presenting this Court with an empirical study indicating that during the twenty-seven month period January, 1970 through March, 1972, appellate courts nationwide have found police conduct in cases of warrantless search and seizure to have been lawful and proper in six out of every seven cases. With this record this country's police do not need to be policed by the absolute sanctions of the Exclusionary Rule.

Finally, we ask that the scope of the Exclusionary Rule be narrowed to encompass only willful, flagrant, and substantial violations. This Court will find, we submit, that the instant case, on its facts, represents a non-willful, insubstantial violation of the Exclusionary Rule and thereby provides an excellent vehicle for the narrowing of the scope of this harmful, and ineffective, rule.

## ARGUMENT.

### I.

### THE DELETERIOUS EFFECTS OF THE EXCLUSIONARY RULE UPON LAW ENFORCEMENT, TOGETHER WITH THE GROWING NUMBER OF CRITICS OF THE ABSOLUTE APPLICATION OF THE EXCLUSIONARY RULE, SUGGEST THAT A RE-EXAMINATION OF THE SCOPE OF THE RULE BY THIS COURT MAY BE IN ORDER.

As is well known, the Exclusionary Rule requires the automatic suppression of reliable and probative tangible evidence obtained by law enforcement officers if a court subsequently determines that the search or seizure was unreasonable. From its inception in 1914[1] the Rule evolved through the years until finally in 1961 this Court in *Mapp v. Ohio*, 367 U. S. 643 (1961), imposed the Exclusionary Rule upon the states for two reasons: (1) to deter unlawful police conduct and (a) to prevent the courts from participating in unlawful searches and seizures.

The United States Supreme Court believed in 1961 that judicial integrity required the results announced in the *Mapp* decision. The United States Supreme Court of 1972 now has the opportunity, with the benefit of hindsight, to re-examine the Exclusionary Rule and the results produced by its application, nationwide, during the past eleven years.

Criticism of the Rule, from experts in our criminal justice system, has steadily increased in recent years. The critics cannot agree with a rule which forces the finder of fact to wear blinders in the search for the truth. Chief Justice

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1. *Weeks v. United States*, 232 U. S. 383 (1914) held that evidence which had been illegally seized by federal officers could not be used in federal courts.

Weintraub of the New Jersey Supreme Court succinctly summed up this anomaly when he said:

> Truth and justice are inseparable. A deliberately false judgment debases the judicial process, and no less so because the false judgment is an acquittal. On a motion to suppress we deal with evidence of guilt, and the purpose of the litigant is to conceal that evidence to the end that he will escape conviction notwithstanding his guilt. Hypothetically there could be some case in which the evidence sought to be suppressed would falsely suggest guilt, but a judge would be short in realism if he did not understand that the evidence he is asked to suppress is evidence of guilt and that the judgment of not guilty, which will ensue will likely be false. To justify so serious an insult to the judicial process some compensating gain should be incontestable. *State* v. *Bisacci*, 279 A. 2d 675, 676 (N. J. 1971).

With reference to Chief Justice Weintraub's final sentence, we submit that the absolute application of today's Exclusionary Rule should be re-examined in order to determine if it is, in fact, justified. The primary "compensating gain" envisioned by the U. S. Supreme Court was the deterrence of unlawful police conduct;[2] yet, we speculate that not one brief will be submitted to this Court citing statistics contrary to the conclusion that illegal police conduct has not been deterred by the Exclusionary Rule. On the other hand, one detailed study supports the aforementioned conclusion. An examination of the Exclusionary Rule was made by Dallin H. Oaks, then a professor of law at the University of Chicago.[3] After scrutinizing all the

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2. In *Linkletter* v. *Walker*, 381 U. S. 618, 637 (1965) this Court said "In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendent."

3. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Professor Oaks is now the Provost of Brigham Young University.

available data, he concluded that the data did not provide any "empirical substantiation or refutation of the deterrent affect of the Exclusionary Rule."[4] His own judgment is that the Exclusionary Rule is "a failure" as a deterrent.[5]

Chief Justice Burger has on several occasions criticized the argument that the Exclusionary Rule deters unlawful police conduct:

> Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally take notice and be deterred. As I see it, a fair conclusion is that the record does not support a claim that police conduct has been substantially affected by the suppression of the prosecution's evidence.[6]

Again in 1971 the Chief Justice commented that the hope of guiding police conduct "by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream" and that history has demonstrated that the Exclusionary Rule is "both conceptionally sterile and practically ineffective in accomplishing its stated objective."[7]

Also included among the critics of the Exclusionary Rule are many of this country's prosecutors. Carole S. Vance, District Attorney of Houston, Texas, and then President of the National District Attorney's Association, believes that the Exclusionary Rule is "perhaps the most unjust, outdated and over-rated legal doctrine in the U. S. today,"[8]

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4. *Id.* at 709.

5. *Id.* at 755.

6. Burger, *Who Will Watch the Watchman*, 14 AM. U. L. REV. 1, 11 (1964).

7. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 415 (1971) (dissenting opinion).

8. Vance, *Why The Exclusionary Rule Should be Modified*, 7 THE PROSECUTOR 399 (1971).

and that it "regards the overzealous officer of the law as a greater danger to the community than the unpunished murderer or narcotics pusher."[9]

The National Association of Attorneys General, concerned about the effects of the Exclusionary Rule, passed a resolution on December 15, 1971 which, among other things, declared that "the Exclusionary Rule provides an inflexible remedy for violations of an accused's rights, without regard to the nature, circumstances or substantiality of the claimed violation or of the rights involved...."

State court judges can be added to the list of critics. Directing his concurring opinion to the backlog created by the Exclusionary Rule, Justice George Brown of the California Court of Appeal stated:

> Many authorities have concluded that the operation of the rule in practice has done no more than bear out the prediction of Mr. Justice Spence in the Cahan case to the effect that the rule would lead to interminable delays, excessive expense, and great uncertainty. I have no doubt that it has led to a glut of cases in the courts caused by a multiplicity of challenges to the methods by which evidence was obtained at every stage of most criminal proceedings. While most of these challenges are unsuccessful, I am convinced that the amount of court time consumed in the consideration and disposition of such contentions is so large as to be one of the principal causes of our current case backlog and our overworked courts. *People* v. *Superior Court (Hawkins)*, 18 Cal. App. 3d 640, 645 (1971).[10]

The criticism of the absolute effects of the Exclusionary Rule is not restricted to this country. Both Canada and

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9. *Id.* at 401.

10. The case was subsequently vacated by the California Supreme Court *People* v. *Superior Court* (*Hawkins*), 6 Cal. 3d 757 (1972).

England have rejected the Exclusionary Rule.[11] A leading Canadian case is *The Queen* v. *Wray*, 11 D. L. R. 3d 673 (1970). At page 674 the Canadian Supreme Court stated:

> The admission of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the admission of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly. The trial Judge's discretion to exclude evidence which is admissible is limited to those cases where he has a duty to ensure that the minds of the jury will not be prejudiced by evidence which has very little probative value and which also has a great prejudicial effect. Even if the evidence has been obtained unfairly in the opinion of the trial Judge it is not his duty to exclude it if its probative value is unimpeachable.

Brevity requires that we cite only a representative selection of the authorities calling for a total or partial abolition of the Exclusionary Rule. An additional list of authors expressing their disenchantment with the anomalies produced by this Rule can be found in Chief Justice Burger's appendix to his dissenting opinion in *Bivens, supra*, at 426, 427.

As *amici*, we would fall short of our purpose in filing this brief if we did not attempt to espouse the views of he law-abiding citizen. We can, in this respect, base our comments upon our continuous contact with citizens' groups around the country. The complaint heard most often is that too many factually guilty defendants are being released by the

11. *See*, Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L. S & P. S. 271, 272 (1961); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L. C. & P. S. 272 (1961); Groom, *The Admissibility of Evidence Illegally Obtained*, 13 CHITTY'S L. J. 54 (1964).

courts. The continued refusal of the courts to accept reliable evidence indicative of the guilt of an accused is dangerously threatening a further lack of respect for and confidence in our system of criminal justice. To the layman the release of a guilty defendant as a result of illegally seized evidence is just another example of an acquittal on a "technicality."

We believe that our society has the right to express its disaffection with the effects of the Exclusionary Rule since any member of that society is potentially the next victim of the unpunished guilty criminal. Attached as an Appendix to this brief are summaries of sixteen sample cases in which the Exclusionary Rule has, in recent years, been applied. Even a cursory reading of these cases will engender a better understanding of society's growing criticism of our courts. These cases demonstrate instances in which convictions were reversed or highly probative evidence suppressed in cases involving on the one hand serious, reprehensible crimes committed by the offender and on the other hand relatively insubstantial "violations" by police officers. A rule which allows criminals of this sort to be freed or to have their convictions reversed can be justified only by clear and convincing evidence that its benefit to society outweighs this obvious cost. We submit that any evidence of the benefits of the Exclusionary Rule fails to meet this test.

Our position in this case has been succinctly stated by a former Justice of the Supreme Court of Victoria, Australia. An address delivered by Honorable Sir Reginald Sholl to the Philadelphia Bar Association on March 7, 1966 was reported in the *Congressional Record*, Senate, 92nd Cong. 2d Sess., January 26, 1972 at § 509. At § 511 this distinguished Australian lawyer stated:

> In your enthusiasm for liberalism at all costs, you are, perceptibly more than we are in Australia, throwing

> the baby out with the bath water. It is no good making individual liberty so cast-iron, by constitutional guarantees, that one's neighbour can rob one, or rape one's daughter, with a better chance of escaping justice than in other civilized countries. How stands life, liberty, and the pursuit of happiness, in that situation? It is indeed an empty freedom, a vain individual liberty, which is accompanied by a significantly increased risk to oneself or one's family of being the victim of crime. What is the real value of greater individual liberty, so-called, if it is obtained at the price of making crime harder to detect and punish, and therefore safer to commit? What is the real value to a decent law abiding citizen of being in less danger of possible abuse of power by the police, but in greater danger of fraud, theft, violence or death from criminals large and small, organized or unorganized?

The deleterious effects of the Exclusionary Rule upon society and upon law enforcement appear, to us, to be patent. We turn now to more specific comments upon police practices and the application of the Exclusionary Rule.

## II.

### A STUDY OF POLICE SEARCH AND SEIZURE PROCEDURES NATIONWIDE INDICATES THAT THE ABSOLUTE SANCTIONS OF THE EXCLUSIONARY RULE MAY NO LONGER BE NECESSARY TO "POLICE THE POLICE".

Chief Justice Burger, dissenting in *Bivens*, pointed out that the Exclusionary Rule is premised on the theory that the ". . . suppression of evidence . . . was imperative to deter law enforcement authorities from using improper methods to obtain evidence." 403 U. S. at 413. This theory of deterrence is, in effect, a product of the belief that the courts of this country must "police the police," via the Exclusionary Rule, to prevent them from engaging in improper conduct in the area of search and seizure. This

Court in the instant case is being asked to consider a narrowing of the "police the police" concept, therefore it becomes vital to consider modern police behavior in the search and seizure area with a view towards answering the question of whether the vast majority of today's law enforcement officers have become sufficiently professional in their search and seizure conduct that the absolute sanctions of the Exclusionary Rule are no longer necessary to "police" them.

We believe, and we will present evidence in this section, that the greatest majority of today's law enforcement officers do, in fact, desire to observe and engage in proper search and seizure procedures and that, with few exceptions, their attempts to conduct themselves with propriety in this difficult area have met with success. A consideration of this aspect of the question is, we submit, highly significant to any analysis of whether the scope of the Exclusionary Rule should be narrowed.

With regard to the desire of the police to conform their behavior to the law in search and seizure cases, Mr. Justice Tom Clark, dissenting in *Chapman* v. *United States*, 365 U. S. 610 (1961) and calling for more clear-cut rules to guide the police in search and seizure cases, summed up what we believe to be the attitude of the majority of our nation's policemen:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with a problem of search and seizure. *He is anxious to obey the rules that circumscribe his conduct in this field.* 365 U. S. at 622 (emphasis added).

We agree with this characterization of the attitude of the modern law enforcement officer but, concededly, mere *desire* to obey the rules in and of itself would not be sufficient. A second and more important element—the degree of *success* with which this desire is translated into proper

searches and seizures must be considered. Such a consideration, in order to demonstrate police professionalism in the search and seizure area is the purpose of this section.

In order to measure the propriety of police conduct in search and seizure, nationwide, we have conducted a study of search and seizure cases decided at the appellate level in all jurisdictions in the United States in the twenty-seven month period January, 1970 through March, 1972. We will describe briefly the methodology of this study in order to provide this Court with concrete, empirical evidence of the degree to which this country's law enforcement officers have shown themselves capable of conducting lawful and proper searches and seizures in the greatest majority of cases which have been singled out for appellate review.

**(1) Source Material.**

The source of cases for our study is *Nedrud: The Criminal Law*,[12] which is a monthly survey of all of the reported decisions in criminal law areas which have been decided by every state and federal appellate court in the United States.[13]

Concerning their source material for cases summarized in the Nedrud service, the editors state:

> MATERIAL PREPARATION-COVERAGE
>
> The case summaries for each monthly issue are prepared by the editors from the court opinions published in the Advance Sheets of West's National Re-

12. Nedrud: The Criminal Law, Edited by Duane R. Nedrud and Marguerite D. Oberto, LE Publishers, Inc., 612 N. Michigan Ave., Chicago, Ill. 60611.

13. This study does not include cases decided by the U. S. Supreme Court, but all other appellate cases under which police procedures are judged according to the guidelines laid down by the U. S. Supreme Court. Additionally it does not include obscentity cases in which the ruling on a search and seizure was tied to a ruling on what constitutes obscene matter.

porter System (including the New York Supplement and the California Reporter) for the month preceding the issue's mailing date, e.g., the February service includes the cases reported in the January Advance Sheets. Because the purpose of this service is to provide a permanent research source that is national in scope, the original source material is the National Reporter System rather than state advance sheets or slip opinions directly from the courts themselves.

All points of every case, which points are actually ruled upon by the court, are abstracted and appropriately categorized (so that one case may be cited in several different sections), except where the court gives only perfunctory or memorandum treatment to the questions raised. Also cases which are decided on the sufficiency or "weight" of the evidence are not reported unless a novel point of fact or law is involved.[14]

Thus for the purposes of our study we have used summaries of all of the reported search and seizure cases decided by appellate courts on every level of the judicial system in this country, at least insofar as the courts have considered the issues to be worth detailing in a written opinion in more than a perfunctory manner. Our study encompasses the entire spectrum of appellate opinion on search and seizure in the United States.

### (2) The Reasons for Studying Appellate Cases.

We believe that the use of appellate cases in our study presents the most comprehensive picture obtainable of judicial review of police search and seizure procedures. As a general rule, cases which have reached the appellate level have had the most thorough judicial treatment, both parties will have had the opportunity to present briefs and to make oral arguments and the appellate judges will have had the opportunity to review thoroughly the police behavior, presented in the facts of the case and to review,

14. *Nedrud: The Criminal Law* How to Use This Service

in the relatively calm and thoughtful atmosphere of the appellate process, the law of search and seizure as it is applied to the facts.[15]

Further, the appellate courts of this country generally choose to deal with novel or important areas of the law involved, or areas in which substantial questions of individual rights are involved, so that a study of appellate cases presents a very broad range of issues involving police procedures.

Additionally, since our study covers every appellate court in the country the range of judicial opinion on search and seizure issues is the widest possible. Our study, we believe, encompasses a truly national sample of the reported decisions of judges who are, by definition, sufficiently learned in the law to have reached the appellate court level, and who provide a nationwide representation of all possible judicial views with regard to police search and seizure activities.

Finally, since our study covers all of the reported state and federal appellate decisions for the period involved, we are able to see the entire panoply of search and seizure law in the United States brought to bear on the ability of law enforcement officers to deal, properly, with search and seizure problems.

**(3) The Types of Cases Studied.**

Because we seek in our study to measure police performance in the search and seizure area, we have chosen to consider only those cases classified in the *Nedrud* service as warrantless searches and seizures. Such searches and

15. This is in marked contrast to the motion to suppress stage which, in many of our crowded courts are hurried, even perfunctory, affairs with an overworked prosecutor seeing the case for the first time as he steps up to try the motion and with judges making on-the-spot decisions without a thorough review of the law and the facts. *See*:, *e.g.*, Oaks, supra, at 668.

seizures are truly those in which the policeman, on the street, must make his own decision as to whether to proceed with a given search or not. These are the cases in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions. Such cases, we submit point out as dramatically as possible how today's police officer, dealing in the extraordinarily complex area of search and seizure and operating under this Court's admonition that warrantless searches and seizures are "per se unreasonable" unless they can be otherwise justified,[16] have nevertheless been upheld at the appellate level in their warrantless search and seizure procedures to a truly astounding degree.[17]

The *Nedrud* classifications of cases studied are as follows:

1.1—Arrest and detention—Reasonable Grounds
1.4—Detention: Stop and Frisk
2.3—Search and Seizure Incident to Arrest; Arrest or Search for one offense, seizure for another.
2.4—Autos, Without Warrant
2.5—Persons and Places, Without Warrant.

These categories, we believe, cover the entire range of warrantless searches and seizures by law enforcement officers.

**(4) Results of the Study**

Of 1,371 cases involving warrantless searches and seizures by the police which were decided by appellate

16. *See; Katz* v. *United States*, 389 U. S. 347, 357 (1967).

17. Some cases involved both warrant and non-warrant procedures; however our study only encompasses those cases in which warrantless procedures were examined.

courts during the 27 month period covered by the study, the police conduct of the search and seizure was upheld as lawful in 1,157 cases and held to be unlawful in 214 cases. Thus six of every seven searches and seizures studied were upheld by reviewing courts; 84% of police search and seizure procedures were found to be proper upon appellate review.

The following is a breakdown by category:

| Arrest & Detention: | 1970 Lawful | 1970 Unlawful | 1971 Lawful | 1971 Unlawful | Jan.-Mar. 1972 Lawful | Jan.-Mar. 1972 Unlawful |
|---|---|---|---|---|---|---|
| Reasonable Grounds | 153 | 23 | 184 | 19 | 47 | 5 |
| Detention: | | | | | | |
| Stop and Frisk | 85 | 9 | 76 | 22 | 25 | 3 |
| Search & Seizure Incident To arrest; arrest or search for one offense, seizure for another | 57 | 15 | 47 | 15 | 11 | 2 |
| Search and Seizure Autos Without Warrant | 97 | 20 | 154 | 33 | 43 | 6 |
| Persons and Places, Without Warrant | 62 | 18 | 88 | 21 | 28 | 1 |
| | 454 | 85 | 549 | 110 | 154 | 19 |

| | Lawful | Unlawful | |
|---|---|---|---|
| 1970 | 454 | 85 | |
| 1971 | 549 | 110 | |
| 1972 | 154 | 19 | |
| | 1157 | 214 | = 1,371 Total |

We believe that these figures speak for themselves and show an extraordinarily high degree of police professionalism in the area with which we are concerned herein. Our contention is that police professionalism in the search and seizure area is such that the absolute sanctions of the exclusionary rule are no longer constitutionally mandated. When a body of men and women as amorphous as the 440,000 law enforcement officers in the United States is able to compile an 84% record of proper, *warrantless* searches and seizures in cases which have been brought under appellate judicial scrutiny, we believe that the good faith and professionalism of the great majority of our law enforcement officers has been amply demonstrated.

It cannot be said, moreover, that the reason for this excellent record of successful police compliance with the rules of search and seizure is, in fact a product of the Exclusionary Rule, that without the Rule such a record would not have been compiled. Such an argument, in the fact of evidence of substantial lawful police conduct, must be based on the premise that the Exclusionary Rule does in fact deter all unlawful police conduct.

This argument is tenuous at best. Chief Justice Burger, dissenting in *Bivens,* makes a compelling case for the rationale that the Exclusionary Rule does not in fact deter unlawful police conduct. (*See, e.g.,* Oaks, *supra.*). The Chief Justice delineated reasons for the non-deterrence theory, including:

1. The rule does not apply direct sanctions upon individual officers for misconduct, and law enforcement agencies rarely discipline officers responsible for the application of the Exclusionary Rule to a given case.[18]
2. The prosecutor is actually the one who "loses" the application of the Exclusionary Rule to his case, and prosecutors are rarely in a position to impose sanctions upon a police officer for violations.[19]
3. The realities of law enforcement work make it unlikely that policemen will "read and grasp the nuances of appellate opinions that ultimately define the standards of conduct they are to follow.[20]
4. The lapse of time between a given police action and its final judicial evaluation makes it equally unlikely that a policeman will even become aware of the final result of an appellate decision as to his conduct.[21]

If then the threat of the Exclusionary Rule is not an effective sanction to police misconduct, the reason for the

18. 403 U. S. at 416.
19. *Id.* at 417.
20. *Id.*
21. *Id.*

very high incidence of proper police conduct, as indicated by our study, must lie elsewhere. We believe it lies in police professionalism: an attempt by the majority of policemen to know, at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions. We believe that it would do a great disservice to the law enforcement officers, who have compiled the record of successful compliance with search and seizure restrictions as is indicated by our study, to postulate this compliance on a grudging subservience on their part to the Exclusionary Rule. We believe rather that this Court should consider the apellate search and seizure record of the police as described herein as evidence of professionalism and good faith desire to operate as effectively as possible, *within the law.*

Certainly, we do not deny that there is, still, a minority of "bad" policemen who do, on occasion, engage in willful misconduct in the search and seizure area and who engage in substantial and improper invasions of privacy. We believe, however, that our study shows that such "bad" ones are clearly in the minority; and we submit that the absolute sanctions of the Exclusionary Rule are no longer mandated to "police" the entire law enforcement profession because of the few "bad" members (who, incidentally, would hardly be deterred from their unlawful conduct by the Exclusionary Rule anyway).

This leads us then to the question of whether the application of the Exclusionary Rule should be narrowed to encompass only substantial, flagrant, and willful violations of Fourth Amendment rights. We turn to a consideration of this question, in the context of the instant case, in the next section.

## III.

## THE SCOPE OF THE EXCLUSIONARY RULE SHOULD BE NARROWED TO ENCOMPASS ONLY WILLFUL, FLAGRANT, AND SUBSTANTIAL VIOLATIONS.

We have contended in the first two sections of this argument that:

a. The Exclusionary Rule has had a definite adverse effect upon law enforcement in this country and consequently upon the rights of the law abiding members of our society to be reasonably free from criminal harm, and

b. Based on a study of current appellate search and seizure cases, today's law enforcement officers are, in general, sufficiently professional that the absolute sanctions of the Exclusionary Rule are not Constitutionally necessitated to "police the police."

The instant case provides an excellent vehicle for this Court to consider the narrowing of the Exclusionary Rule requested by the Petitioner. Such a narrowing was suggested by Chief Justice Burger in his dissenting opinion in *Bivens*. After stating that he could not countenance doing away with the Exclusionary Rule *entirely* unless proper alternatives to restrain and punish unlawful police conduct were set up, the Chief Justice, nevertheless stated:

> Independent of the alternative embraced in this dissenting opinion, I believe the time has come to reexamine the scope of the Exclusionary Rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced. 403 U. S. at 424.

With this in mind it is appropriate to consider the facts of the instant case. First of all, it seems clear that the "violation" involved in searching Respondents' garbage after the garbage collectors had picked it up and

segregated it, at the request of the police, was not a willful violation. This is surely evidenced by the fact that of eleven judges reviewing the police conduct in question in the instant case, at least six felt that the police conduct was proper. It would indeed be difficult to accuse the police officers of willful misconduct when so large a percentage of reviewing judicial officers believed that there was no violation at all.

Next the "violation" was not substantial. Had the officers in this case, upon receipt of the first anonymous tip, entered Respondents' house, without further ado, to make the arrest and search, certainly the *amici* herein, and, we suspect, the State of California, would not be before this Court attempting to justify such police conduct. Such activities would have constituted a flagrant (and perhaps a willful) violation and even under the "narrowing" doctrine sought in this case the Exclusionary Rule would have properly been applied. But the officers did *not* make an entry based on a mere unsupported tip. Rather, they sought to gain, through proper independent investigation and surveillance, sufficient corroborating evidence to establish probable cause for an arrest, and they only acted after they felt that they had established such probable cause.[22] Thus, whereas an entry to arrest based on the original tip would have obviously been a substantial violation of Respondents' rights, the police activity which actually transpired is, we submit, a relatively insubstantial violation.

Certainly the police were attempting to follow the rules of search and seizure under the facts of the instant case as,

22. While it is true that the police made a warrantless entry to arrest and search *after* they had examined the garbage, the entry was made in 1968, prior to this Court's decision in *Chimel* v. *California*, 392 U. S. 752 (1969), which prohibited extensive warrantless searches of premises incident to an arrest. At the time that the police acted in the instant case they were acting well within the strictures of California law. *People* v. *Chimel*, 68 Cal. App. 2d 436 (1968).

we believe, based on the search and seizure study presented in Section Two of this argument, most policemen do.

Should, then, Respondents be freed because four judges of seven sitting on the California Supreme Court felt that the police "blundered"? We do not believe that they should, at least not based upon the non-willful and insubstantial "violation" of their Fourth Amendment rights which the facts of the instant case disclose. Thus is presented to this Court in clear focus the narrowing the Exclusionary Rule sought by Petitioner and *amici* in the instant case.

We believe a holding that non-willful, insubstantial "violations", such as occurred in the instant case, should not automatically invoke the absolute sanctions of the Exclusionary Rule would have a salutary impact on the effectiveness of law enforcement without doing violence to basic and fundamental civil liberties. What we seek is a balancing approach in such cases rather than the currently prevailing absolutist approach taken towards the application of the Exclusionary Rule. The Exclusionary Rule should not be done away with completely (at least until suitable legislative alternatives to it can be found); but we believe that it should only be applied to willful, flagrant, substantial violations and that a decision as to the application of the Exclusionary Rule should be made based on the facts of each case.

Our position with regard to the selective application of the Exclusionary Rule would not, of course, leave aggrieved parties without a remedy. Civil actions in false arrest, invasion of privacy, malicious destruction of property and relief under the Federal Civil Rights Act[23] would remain. And under the theory advanced by *amici* herein, the full

23. This Court in 1971 specifically held the Federal Civil Rights Act applicable to search and seizure violations by Federal Officers and, by implication, to state officers. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971).

sanctions of the Exclusionary Rule would remain for willful and substantial violations. The position which we advocate does not dispense with the Exclusionary Rule entirely, but rather would merely permit the courts to weigh, on the one hand, the application of the Exclusionary Rule, and on the other the right of society to convict those defendants whose factual guilt is evident, notwithstanding certain violations of Fourth Amendment rights, which violations have been found by a trier of fact to be insubstantial and non-willful.

One final point should be made with regard to our argument in this brief. Chief Justice Burger in his dissent in *Bivens* quite properly expressed his concern that if the Exclusionary Rule were to be completely overruled, law enforcement officers might receive the impression that there were no constitutional restraints upon their conduct.[24] We believe that the police profession in this country would come to no such conclusion. The study of appellate review of police search and seizure procedures which we have presented in Section Two of this argument indicates a high degree of desire and a high degree of success by the police in complying with search and seizure laws and rules. We do not believe that a narrowing of the application of the Exclusionary Rule would result in wholesale deviations from the rules circumscribing police conduct. Additionally we emphasize again that we do not advocate doing away with the sanctions entirely, but we advocate rather a balancing test which looks to the extent of the violation rather than to applying the sanction in the current absolutist manner.

Such a narrowing additionally might well have an extremely beneficial effect on police internal discipline. At present *any* Fourth Amendment violation must result in the suppression of evidence and police officials are reluctant to discipline officers for such violations even though vital

24. 403 U. S. at 421.

evidence necessary for a conviction may be lost thereby.[25] The narrowing approach suggested herein would have the effect of exposing those cases of willful and flagrant violations in sharp focus. To give an example, suppose a given police officer did not secure a search warrant for a certain premises simply because he was too lazy to do so, although he had ample opportunity and there were no "exigent circumstances" to excuse his failure. A warrantless search under these circumstances would clearly be a willful, flagrant, and substantial violation, and the Exclusionary Rule would apply. A police chief or a prosecutor under these circumstances could properly call for strict disciplinary measures against the offending officer because the mere application of the Exclusionary Rule under a narrowing doctrine would indicate a willful violation and the officer's dereliction would be brought out in sharp contrast with the conduct of other policemen whose behavior, while technically violative, would not be sufficiently unlawful to invoke the Exclusionary Rule sanctions.

Chief Justice Burger has pointed out that the Exclusionary Rule is today indiscriminately applied to *all* Fourth Amendment violations, and that:

> Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate *Irvine*-type violations of the Fourth Amendment, *Bivens, supra,* at 418.

We argue herein that only those "inadvertent errors of judgment that do not work any grave injustice" should be taken out of the Exclusionary Rule; that the record of the police as described herein in appellate search and

25. See the dissent of Chief Justice Burger in *Bivens*: "With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the Suppression Doctrine." 403 U. S. at 416.

seizure cases certainly gives this Court a basis for so holding; and that such a holding, by highlighting the willful and substantial violations in which the Exclusionary Rule would still be applied, would be a useful means of focusing disciplinary action against the few "bad cops" while at the same time neither the majority of good law enforcement officers nor society would continue to suffer because of inadvertent, insubstantial and non-willful police errors.

## CONCLUSION.

The Exclusionary Rule has, in today's context, become a widely criticized anomaly in the criminal justice system. Designed to "police the police", it has apparently failed to accomplish this function, while at the same time it has had a direct deleterous impact upon the effectiveness of law enforcement.

We have, herein, presented this Court with an empirical study indicating that during the 27-month period January 1970 through March 1972, appellate courts nationwide have found police conduct in cases of warrantless search and seizure to have been lawful and proper in *six out of every seven—that is, 84% of the cases considered.* We believe that this record bespeaks a high degree of professionalism on the part of our law enforcement officials, and we argue that perhaps the American policeman of 1972 does not need the absolute sanctions of the Exclusionary Rule to "police" his conduct.

Finally, the instant case, on its facts, provides a vehicle for this Court to narrow the scope of the Exclusionary Rule to those cases in which violations are, in fact, flagrant and

willful. We urge this Court to consider such a narrowing approach in the interest of society and in the interest of the effective enforcement of the criminal law.

Respectfully submitted,

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# APPENDIX.

Cases in which the absolute application of the Exclusionary Rule has resulted in the suppression of probative evidence of serious crimes and/or the reversal of the conviction of the perpetrators of the crimes.

*Coolidge* v. *New Hampshire*,
403 U. S. 443 (1971).

On January 13, 1964, Pamela Mason, a 14-year old school girl, left her house on a babysitting assignment. Eight days later her frozen body was discovered in a snow drift just a few miles from her home. Her throat had been slashed, and she had been shot in the head.

The defendant's car matched the description of a car which had been seen on the night Pamela disappeared and at the spot where her body had been found. The defendant, upon his own admission, was a frequent visitor to a laundromat where she posted her babysitting notice, and a knife belonging to the defendant was found in the laundromat. The defendant's wife voluntarily produced two shotguns and two rifles which belong to the defendant and offered them to the police. A subsequent examination of the guns revealed that one of the rifles had fired the bullet which was found in the murdered girl's brain.

Upon the basis of this evidence, the state Attorney General, who was authorized under New Hampshire law to issue warrants, issued an arrest warrant for the defendant and a search warrant for his automobile. Sweepings of dirt and other fine particles taken from the car matched like particles taken from the clothes of the murdered girl. These items were introduced into evidence at trial.

After studying the case for more than five months, the Supreme Court held (5-4) that the search of the automobile was unreasonable. *Although five justices in the majority could not agree as to why the search was illegal, they did find that the search warrant was invalid on the basis that the Attorney General was not a neutral and detached magistrate. Conviction reversed.*

*Bowers* v. *Coiner*,
309 F. Supp 1964 (S. D. W. Va. 1970).

The defendant Bowers was convicted in state court for the armed robbery of a savings and loan company.

FBI agents with a warrant for Bowers' arrest went to the apartment of one William Eagle where Bowers was a frequent guest and attempted to arouse the occupants. The lights were on but no activity was seen. An agent went to a pay telephone across the street and telephoned Mr. Eagle, the lessee of the apartment. The agent told him that FBI agents were outside the apartment and that they wanted to talk to him. The agent could hear the other agents knocking on the door through the telephone. Mr. Eagle opened the door, and the agents entered and subsequently arrested Bowers who was sleeping in the bedroom. The agents seized two revolvers, a .38 and .25 caliber.

*The court held that because the agents had neither announced their authority nor their purpose, the entry and subsequent search and arrest were in violation of the Fourth Amendment.*

*People* v. *Trudeau*,
187 N. W. 2d 890 (Mich. 1971).

On November 6, 1967, during an attempted burglary of a vault at a synagogue in Southfield, Michigan, the night

watchman was killed by blows to his head from a crowbar. One of the few leads was a heel print left at the scene. On November 19, 1967 the defendant was arrested inside a United States Post Office where he had attempted to break and enter a vault.

Because of the similarity between the two jobs, the detective assigned to the murder case attended a preliminary hearing on the Post Office case in order to view the defendant's shoes. His shoes were subsequently removed by two police officers without a warrant and given to the detective.

At trial, the shoes, the imprint, and their comparison by an expert were introduced into evidence and the defendant was convicted of second degree murder. *The court held that the removal of the shoes without a warrant violated the Fourth Amendment. The case was reversed and remanded for a new trial.*

*United States* v. *Davis*,
423 F. 2d 974 (5th Cir. 1970).

FBI agents in a rural area of Alabama arrested Davis and his son pursuant to warrants charging them with the unlawful flight to avoid prosecution for the larceny of an automobile. Before the arrest procedures were completed, the defendant bolted from the house. He ran towards his house with the agents and his son in hot pursuit. He stopped at the steps, turned, and brandished a .38 calibar pistol. In the gunfire that followed, the defendant's son was wounded. When order was finally restored, the agents cared for the son until an ambulance arrived. They then took Davis to Montgomery.

About three and one half hours later the agents returned to the scene to retrieve Davis' weapon. Although it was after dark, they discovered the pistol immediately upon

alighting from the car because of the reflection of the porch light on the surface of the gun. The gun was recovered from the yard, and the agents left.

The court held that the entry into the yard without a warrant was unreasonable.

*Root* v. *Gruper*,
438 F. 2d 361 (8th Cir. 1971).

The victim, Lonny Sutton, called the telephone operator saying that his wife had shot him and to call an ambulance because he was dying. The ambulance driver and his assistants found Sutton unconscious from a shotgun wound. On the way to the hospital they passed the marshal who was on his way to the scene of the shooting. Sutton was dead on arrival.

The marshal waited at the residence, which was empty, until the sheriff arrived. Together they entered the house and proceeded to the kitchen where they found a shotgun and shells which were introduced into evidence at trial. *The defendant's conviction was reversed on the basis that the warrantless search of the house was unjustified.*

*United States* v. *Colbert*,
454 F. 2d 801 (5th Cir. 1972).

In Birmingham, Alabama on the evening of October 24, 1970, two officers, who were on call to another destination, noticed the defendants Colbert and Reese standing empty handed in front of a nightclub. One of the officers noted that Colbert fit the description of a man wanted by the Birmingham police for assault with attempt to commit murder.

After making their call, the police officers observed the defendants carrying expense briefcases near the same location where they had previously been seen. The defendants

began walking towards a parked automobile. The driver of the automobile, spotting the police officers, made a motion toward the defendants and sped off. When the officers got out of their car, the defendants placed their briefcases on the sidewalk and walked away. The defendants denied ownership of the briefcases and refused to identify themselves. One of the officers opened the briefcases and found that each contained a sawed off shotgun of illegal length. *The defendants conviction for possession of an illegal firearm was reversed. The Court (2-1) held that the search of the briefcases and the seizure of the guns without a warrant was unreasonable.*

*United States* v. *Soriano*,
Case No., 72-25-CR-JE (S. D. Fla.).

On December 23, 1971 a reliable informant advised agents of the Bureau of Narcotics and Dangerous Drugs that one Anna Betancourt, who resided at 3520 S. W. 4th St., Miami, Florida, was expecting the delivery of a large quantity of narcotics. Previously, on December 16, 1971, the informant and Anna Betancourt had purchased a large amount of milk sugar and Christmas wrapping which were to be used to cut and wrap the narcotics. On January 4, 1972, the informant went to the Betancourt residence and was asked to leave because narcotics were on the premises. Surveilling agents then observed a white male and female enter the house empty-handed and exit a short time later with a large paper shopping bag. They then drove to another location, deposited the shopping bag in a trash receptacle, and drove off. The bag, which was retrieved by BNDD agents, contained numerous glassine bags and Christmas wrapping paper which by chemical analysis proved to contain traces of heroin.

The agents prepared an affidavit which recited these facts. The affidavit was then presented under oath to United

States Magistrate who issued the search warrant and handed it to the BNDD agent who had presented the sworn testimony. Unfortunately, the magistrate had failed to insert the name of the agent to whom it was directed.

*Upon a motion to suppress, the court found that probable cause existed for the search but the failure to insert an agent's name on the search warrant was fatal error. Result —the suppression of 238 pounds of pure heroin. The case is now on appeal.*

*Whiteley* v. *Warden of Wyoming State Penitentiary*, 401 U. S. 516 (1971).

In 1965, a hardware store and a bar located in Saratoga, Wyoming, a remote part of that State, were the subject of a breaking and entering. The sheriff for that area received a detailed description of the car belonging to the bandits as well as part of the license number. In addition the sheriff received a tip that Whiteley and a companion had probably committed the burglary. The sheriff obtained an arrest warrant and then issued a radio alert. Whiteley and his companion were stopped less than 24 hours later in Laramie, Wyoming in a car fitting the description of that involved in the burglary. Whiteley gave the arresting officer a fictitious name, but the officer recognized the companion. The two were arrested, and objects which had been stolen from the hardware store and the bar were found in the car.

At trial, the companion testified in vivid detail how he and Whiteley had accomplished the burglaries, and the stolen items were introduced into evidence. Whiteley was convicted and the case was affirmed on appeal. *Six years and several habeas corpus petitions later, the U. S. Supreme Court held that the search was unreasonable. Conviction reversed.*

Whiteley had previously been convicted of three felonies and had served six terms in the state penitentiary.

*Von Utter* v. *Talloch*,
426 F. 2d (1st Cir. 1970).

A confidential informant known to the police as a user of narcotics, advised that Von Utter would arrive in Provincetown, Massachusetts between March 8th and 10th driving a white volkswagen two door sedan with Connecticut registration JJVU and that the car would contain marijuana and LSD.

The police, who had obtained a search warrant for the automobile, approached the defendant as he emerged from a drugstore and advised him that they had a warrant to search his car. The defendant stated that there would be no need—that he would do it himself. He then reached into the glove compartment, seized some contraband, and fled on foot. The police gave chase, apprehended him, and placed him under arrest. They then searched the car and found a quantity of narcotics. His 1968 conviction in state court was overturned more than three years later on a habeas corpus petition to the Federal court. The court held (1) that the affidavit for the search warrant was inadequate since the informant's tip was too vague to be of any value and (2) the search could not be justified as being incident to a lawful arrest.

*United States* v. *Sokolow*,
450 F. 2d 324 (5th Cir. 1971).

A police officer, investigating the theft of cigarettes, observed the suspect's car back up to Sokolow's garage. The officer saw the cigarettes in the back seat of the car and arrested the suspect. He then noticed a large number of room air-conditioners (29) located in the garage and proceeded to an adjacent motel to question Sokolow about the air-conditioners. After being advised of his rights, Sokolow stated that he had purchased the air-conditioning

units from a local appliance dealer and produced receipts to that effect. The officer examined the receipts and noticed some discrepancies. Sokolow and the officer then walked to the garage where the officer recorded the serial numbers on two of the units.

An N. C. I. C. check of the serial numbers revealed that the units had been stolen, and the appliance dealer advised that Sokolow's "receipts" were estimates and not receipts. Sokolow was arrested and subsequently convicted. *The Court of Appeals, however, ignored many of these facts and held that the taking of the serial numbers without a search warrant was an unreasonable search and reversed the conviction.*

*United States* v. *Kaye*,
432 F. 2d 647 (D. C. Cir. 1970).

Agents of the FBI, who were investigating the theft of Government property, searched the defendant's premises pursuant to a search warrant and seized several items which were later admitted into evidence.

The affidavit asked for a search warrant for "the entire premises of 3618 14th Street, N. W., Washington, D. C., a two story brick building used for the sale and service of TV's, stereos, records and with a large sign reading Fredrick L. and Company." The search warrant issued by the court was captioned "[e]ntire premises, 3618 14th Street, N. W." and authorized the search of "the premises known as 3618 14th Street, N. W."

The entire building was leased to defendant. The defendant's store and shop occupied the first floor and basement, and the second floor was occupied as the defendant's living quarters. Although there was no question about the existence of probable cause to search, the court held that the search warrant did not authorize the search of the second floor apartment regardless of the language in the support-

ing affidavit which might be construed more broadly. The language was the same except for the description "a two story brick building" which was included in the affidavit and not the warrant.

*State* v. *Madden*,
465 P. 2d 363 (Aug. 1970).

James Beck was riding his bicycle along Camelback Road in Phoenix shortly after 3:00 a.m. on October 18, 1967, when a Cadillac pulled alongside of him and forced him off the road. Several assailants emerged from the car, grabbed Beck around the neck and body, forced him into an irrigation ditch, and robbed him of his watch, wallet, checkbook, money and keys. The victim called the police and an emergency bulletin was sent out on the police radio.

At 3:18 a.m. the Cadillac was seen and stopped by the police. The defendants were taken into custody and the car was garaged. About a half an hour after defendants were arrested, the vehicle was searched and the stolen items found.

*The court held that the warrantless search of the automobile was not justified. Reversed.*

*State* v. *Brown*,
260 A. 2d 716 (R. I. 1970).

A police officer observed a red Ford convertible, occupied only by the driver, turn into the driveway of an office building and extinguish its lights. The automobile was strange to that area. The officer next observed the automobile occupied by four persons backing out onto the highway. The driver stopped, alighted from the automobile and approached the officer. When the other occupants started to advance on the officer, he made them get back into the car. At that time he observed a duffle bag stuffed with objects, a pry bar and check-making machine.

The occupants were taken to the police station for questioning. Approximately 30 minutes after they were initially stopped, the police chief walked out to the car where in addition to the above objects he saw two pairs of gloves on the front seat and a walkie-talkie protruding from under the seat. In the interim the police had received a report of a breaking and entering of the office building at the location where the car had been stopped.

*The Rhode Island Supreme Court complimented the police officer for good police work and stated that while a search of the car would have been permissible when the suspects were stopped, the search 30 minutes later was not. Conviction reversed.*

*Hair* v. *United States*,
289 F. 2d 894 (D. C. Cir. 1961).

In *Hair*, police officers were called to investigate a housebreaking, robbery and rape. During the course of this investigation, the victim made a photographic identification of Hair and Burroughs, and a tentative identification of Blakeney. The police immediately went to Hair's house to place him under arrest. As they approached the house, about seven or eight feet from the door, Blakeney opened the door, began to step out, and then turned and ran up the stairs. The officers, without giving notice of their identity or purpose, immediately entered and gave chase. Blakeney dived through a window and escaped. He was subsequently apprehended and identified by the victim. While passing through Hair's house, the officers observed several items which matched the description of the stolen goods. Based upon this observation, they obtained a search warrant and seized these items which were introduced in evidence of Hair's trial. *On appeal, the United States Court of Appeals for the District of Columbia reversed Hair's conviction on the ground that the failure by the*

*police to stop and announce their identity and purpose before entering Hair's house tainted the evidence seized and therefore it was improper to admit those items in evidence at Hair's trial.* Judge Bazelon wrote the opinion of the court. Judge Miller dissented.

*Woods* v. *State*,
466 S. W. 2d 741 (Texas 1971).

A woman who lived alone was awakened in her bedroom by the defendant. He threatened her with a knife, robbed her, and raped her while she was forced to lie on her stomach with a pillow over her head. With the aid of a night light she saw the knife and also noticed that the defendant was wearing leather boots.

As soon as the defendant left, the woman called the police who searched the area and found boot tracks outside the house. The police traced the tracks from the woman's house to the vicinity of the defendant's house. After knocking and entering, the officers observed the defendant standing with boots on. He was questioned and told to go outside and place his boots in the boot tracks. Later, the boots were confiscated and defendant was taken before a magistrate. One of the officers returned to defendant's house, conducted a warrantless search, and found the knife used in the rape.

*Defendant's rape conviction was reversed with the court holding that the arrest and search, without a warrant, were illegal.*

*State* v. *Barwick*,
483 P. 2d 670 (Idaho 1971).

A man was returning to his camper when he was attacked by two men. He was struck to the ground, jumped on, and choked by defendant whom he later positively identified. Defendant took the man's billfold and ran off.

The victim notified police and as they were cruising the area, they noticed a car traveling with a flat tire. The police proceeded to follow the vehicle as it rapidly accelerated and then slowed down. The officers stopped the vehicle and the defendant got out and walked back to the patrol car. While the defendant was attempting to find his driver's license, the officer noticed blood on his hand. The defendant was then arrested for vagrancy. The defendant was advised of his *Miranda* rights after which the police asked him if they could search his automobile and he consented.

While defendant was out on bond for the vagrancy charge, he was arrested for robbery. *The defendant's conviction was subsequently overturned and the evidence was suppressed by the Idaho Supreme Court which found the initial arrest illegal.*